

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY

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4 MARY ANN SIVOLELLA, et al,  
5 PLAINTIFFS

6 Vs. CIVIL NO.  
7 11-4194 (PGS)

8 AXA EQUITABLE LIFE INS. CO.,  
9 et al,  
10 DEFENDANTS

11 GLENN D. SANFORD, et al,  
12 PLAINTIFFS

13 Vs. CIVIL NO.  
14 13-312 (PGS)  
15 AXA EQUITABLE FUNDS  
16 MANAGEMENT GROUP,  
17 DEFENDANT

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DECEMBER 16, 2015  
CLARKSON S. FISHER COURTHOUSE  
402 EAST STATE STREET  
TRENTON, NEW JERSEY 08608

BEFORE: THE HONORABLE PETER G. SHERIDAN  
U.S. DISTRICT COURT JUDGE  
DISTRICT OF NEW JERSEY

HEARING ON SUBMISSION OF BOARD MATERIALS

Certified as true and correct as required  
by Title 28, U.S.C. Section 753  
/S/ Francis J. Gable  
FRANCIS J. GABLE, C.S.R., R.M.R.  
OFFICIAL U.S. REPORTER  
(856) 889-4761

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1 THE COURT: So, this is Sivoletta versus AXA  
2 Equitable. Can we enter appearances? We'll start with the  
3 plaintiff.

4 MR. LAKIND: Yes, your Honor, good afternoon.  
5 Arnold Lakind of Szaferman Lakind for the plaintiffs.

6 MR. R. LAKIND: Good afternoon, your Honor, Rob  
7 Lakind for the plaintiffs.

8 THE COURT: Good afternoon, Mr. Lakinds.

9 MR. KISTLER: Good afternoon, your Honor, David  
10 Kistler from Blank Rome on behalf of the defendants, and I'll  
11 allow my co-counsel to introduce themselves.

12 THE COURT: Good afternoon, Mr. Kistler.

13 MR. MURPHY: Sean Murphy with Milbank, Tweed, Hadley  
14 and McCloy for the defendants, your Honor.

15 THE COURT: Good afternoon, Mr. Murphy.

16 MR. HORA: Robert Hora, also with Milbank Tweed for  
17 the defendants.

18 THE COURT: Good afternoon, Mr. Hora.

19 MR. BENEDICT: And Drew Benedict, Milbank Tweed,  
20 also for the defendants, your Honor.

21 THE COURT: Good afternoon.

22 So, I'd ask that all the parties assist me or help  
23 me out on these things. Letters are okay, but I still think  
24 you still need to follow the rules. And there are

25 requirements in the local rules as to double space and the

1 type of font size, and, you know, I wish you would follow  
2 those rules.

3 And secondly, the one application I'm going to be  
4 dealing with today I thought is the amount of materials from  
5 the Board, and this actually looks like a motion to me. And I  
6 don't understand why we're not following motion rules. And  
7 even though it's close to trial, there's ways of doing that;  
8 you can bring it by order to show cause if it needs an  
9 expedited date, but it doesn't seem to comply with the local  
10 practice in my view.

11 Who wishes to be heard first on the Board materials  
12 is what I think we're dealing with?

13 MR. MURPHY: Your Honor, it's Sean Murphy from  
14 Milbank Tweed for the defendants, your Honor. First let me  
15 apologize for the way we presented the matter. I'm hoping if  
16 I explain what the issue is, maybe you'll see it's a little --  
17 it doesn't fit squarely into kind of a clean motion.

18 THE COURT: I know it doesn't, but these letters  
19 come in on the docket, and I try to keep abreast of them all,  
20 as do my law clerks, but when you see it as a notice of motion  
21 it kind of fits into a different category as to what you're  
22 reading.

23 MR. MURPHY: Fair point, your Honor, and I do  
24 apologize.

25 THE COURT: The thing about it is when it's a

1 discovery matter I know the magistrate judges will handle  
2 things like that, because they'll handle them on an expedited  
3 basis as they come in, but generally when it's a motion that's  
4 dispositive in nature or a significant issue before trial, you  
00:03 5 know, I always look at it as well, if it's important enough  
6 for the parties to present it, then it should be presented in  
7 a more formal way I think. So, somehow a motion seems to be  
8 more appropriate to me I guess is the better way of saying it.

9 MR. MURPHY: Okay, your Honor. And I do apologize.

00:03 10 THE COURT: The double spacing is better for me,  
11 because the way I prepare every day, I wake up very early in  
12 the morning, and some would say it's not even -- it's before  
13 dawn usually. And so when you wake up, even though my mind is  
14 very alert, my eyes are still very -- squinting at the page,  
00:03 15 so I'd just like it to be easier to read early in the day.

16 So, the double spacing and the font size are more important.  
17 And I don't put it on my computer because -- and I  
18 know it's old fashioned, but that's just the way I am, I write  
19 all my notes on the side of the pages. So it's just easier to  
00:04 20 do it.

21 MR. MURPHY: And there's certainly no excuse for  
22 that, your Honor, I apologize. We should have double-spaced  
23 and used larger font regardless of whether it was a motion, so  
24 I do appreciate that and we won't let it happen again.

00:04 25 THE COURT: Okay, thanks.

1 MR. MURPHY: So, just to tee up the issue because  
2 you may want it presented differently in a motion or an order  
3 to show cause, but what we were hoping to do --

4 THE COURT: No, I have you here, we'll do it today.

00:04 5 MR. MURPHY: What we'd like, your Honor, is guidance  
6 on what to do with these "Board materials", and how to handle  
7 the admission of them. And I'm going to -- I'm not going to  
8 try and move them into admission today obviously, but I'm just  
9 trying to frame some of the issues so we can take some of the  
10 burden off you and the delay of trial. And I recognize at  
11 first blush this might seem kind of like a procedural issue,  
12 but it really is -- it does hold the potential to  
13 substantially delay or disrupt trial if we don't deal with it  
14 a little bit in advance.

00:05 15 And first some context here. You'll recall, your  
16 Honor, perhaps from summary judgment, this is a 36(b) case  
17 where plaintiffs have challenged the fees charged to 12 mutual  
18 funds as excessive. And the relevant period, at least  
19 certainly according to plaintiffs, spans over many years, from  
20 2010 at least through 2014, so at least five years.

00:05 21 And these fees were approved by a Board of Directors  
22 each year, a majority of whom were independent trustees,  
23 independent of the advisor. And the documents we're talking  
24 about are the documents that these Board members are given  
25 each year as part of their approval of the fees. There's

1 statutes that govern this, there's a section of the Investment  
2 Company Act that says you must give the Board information that  
3 reasonably allows them to conclude or give them enough  
4 information to approve the fees, so they're governed by  
5 statute.

6 THE COURT: And they're kept in the ordinary course  
7 of business?

8 MR. MURPHY: Totally kept in the ordinary course of  
9 business, your Honor. There's actually Investment Company  
10 rules, Section 31(a) and (b) requires these books and records  
11 be kept; they're subject to inspection by the SCC, when the  
12 SCC comes in this is what they get. There's no question that  
13 these were prepared both before and after the litigation, and  
14 there's very much we think business records -- again I'm not  
15 trying to lay the foundation, we can bring in a witness to do  
16 that, but we have this -- a significant issue and these are --  
17 I should say, your Honor, we believe these are the critical  
18 materials at trial.

19 We have -- between our collective counsel we've  
20 tried four of the seven cases to go to trial under 36(b),  
21 these are always the core of the case. You may recall from  
22 summary judgment the *Gartenberg* factors, you know, these six  
23 factors, one of which is the independence and  
24 conscientiousness of the independent trustees, and courts have  
25 said it's among the most important factor. The Supreme Court

1 approved the standard in *Gartenberg* and said really the  
2 starting point of your analysis is whether the Board had  
3 adequate information.

4 THE COURT: So what I was uncertain about when I  
5 read the letters, was I thought you were trying -- or there  
6 was an attempt to put in all Board materials on all matters  
7 that were reviewed by the Board; but you're only asking to put  
8 in the materials dealing with the fees?

9 MR. MURPHY: They tend to be bundled together, and  
10 maybe the best way to do this is to get right to the heart of  
11 the matter. I mean we're talking about as I said five years  
12 of Board materials, there's at least five meetings a year, but  
13 for example in 2011 and '12 there were 14 meetings, so there's  
14 maybe 50 meetings of the Board at issue. And let me just show  
15 you what they look like.

16 If I may approach, your Honor?

17 THE COURT: Okay, you may. You have to show it to  
18 your adversary.

19 MR. MURPHY: Yes, I'm going to give them one.

20 They've seen this, this is Exhibit 1. They're very --

21 MR. LAKIND: We've seen it, your Honor.

22 MR. MURPHY: I'll give them another copy as well.

23 Actually that may have my handwriting in it. I  
24 don't want ex parte communications -- I think I might get in  
25 trouble if I circled some stuff on the first page, your Honor.



1 (Handing to Court.)

2 THE COURT: Thank you.

3 MR. MURPHY: So, this is -- this is Book 1, and

4 really what you have is -- we needed an efficient way to

5 handle these at trial; right? So this is Book 1. There's

6 usually a Book 1, 2 and 3 for a board meeting; sometimes

7 there's a Book 1 and a Book 2, but there's usually a Book 1,

8 Book 2 and Book 3 particularly at the annual meeting where

9 there's an actual vote on the contracts. And this is how

10 they're kept in the ordinary course of business, your Honor.

11 So there's -- if you go into AXA's files this is

12 what you'd find. When the SEC comes in and they say let me

13 see your Board materials they're subject to inspection, they

14 lay these on the table and the SEC goes through them. So,

15 these are -- these are how they're kept in the ordinary course

16 of business; it's a book. And if you look through them, your

17 Honor --

18 THE COURT: Let's just go back through this book.

19 So, if I was attending this board meeting, which this would be

20 the quarter ending December 31st, 2009; let's say I was a

21 board member, I'd just have one book?

22 MR. MURPHY: So these are actually --

23 THE COURT: How many books would I have?

24 MR. MURPHY: There'd be three books -- for this

25 meeting I think there was three, there's often three. So it

1 would be three books, but they're presented to the Board on an  
2 electronic system called Diligent, which is a big provider in  
3 the industry, and they would be posted as Book 1 on Diligent.  
4 And if you look at --

00:10 5 THE COURT: So, you mean posted in some way on the  
6 Internet so they can review these documents?

7 MR. MURPHY: Yeah, and we would go through this at  
8 trial, your Honor, but they would have an iPad that they can  
9 access them as well that's specifically hooked up. And if you  
00:10 10 look at the tab, for example the second tab is the Agenda,  
11 your Honor, you'll see at the top there's a legend, EQ  
12 Advisors Trust Agenda, and then there would be a legend on  
13 every page of the entire book.

14 The pages are consecutively numbered, they start  
00:10 15 with page 1, and the very last page of this entire book is  
16 numbered 1186. So there's -- it's consecutively numbered from  
17 1 to 1186. And if you look at the agenda, your Honor, what  
18 you say is, you know, references on the right-hand side to  
19 presenter, and it has references to tab 6 of Book 1, tab 5 of  
00:11 20 Book 2.

21 So, the agendas go through and highlight references  
22 to the tab numbers that we don't think would make sense, if  
23 you start unbundling the book, take out random pages. There  
24 are numerous -- there was many depositions in this case, your  
00:11 25 Honor, and witnesses referred to Book 1, Book 2, Book 3; at

1 trial they will certainly refer to the various books and the  
2 tabs within the books.

3 And if I may just hand out one other thing, your  
4 Honor. If I may approach?

00:11 5 THE COURT: You may.

6 (Handing to Court.)

7 THE COURT: We'll mark that Defendant's Exhibit 1  
8 for today. That's the book.

9 MR. MURPHY: That's Book 1, yes.

00:12 10 THE COURT: And then this other one we'll mark as  
11 Defendant's Exhibit 2.

12 MR. MURPHY: Correct. Thanks, your Honor.

13 THE COURT: Can you just describe what Defendant's  
14 Exhibit 2 is, sir?

00:12 15 MR. MURPHY: Yeah, for the record, Defendant's  
16 Exhibit 2 is a compilation of actually three different  
17 documents behind separate tabs. The first one is an agenda of  
18 a board meeting for July 8th and 9th, 2013; second tab is a  
19 set of meeting minutes of the EQAT Board of Trustees for a  
00:13 20 meeting held on July 8th and 9th, 2013; and the third is --  
21 it's one of the exhibits off plaintiff's exhibit lists and how  
22 they presented the materials, I don't have the exact exhibit  
23 number.

24 THE COURT: Okay.

00:13 25 MR. MURPHY: So, if you just look at tab 2 of

1 Defendant's Exhibit 2, your Honor, so this is the minutes of  
2 the meeting of the Board of Trustees, this one was in July of  
3 2013. And I didn't do all of them, if you turn to page 3  
4 there's references in the minutes to presentations that were  
5 given by defendant's employees to the Board that reference --  
6 this one's -- this one references a tab 6 of Book 3. Again,  
7 on page 6, Mr. Joenk then referred the Trustees to the  
8 overview of FMG's profitability located behind tab 5 of Book  
9 3. Page 10 there's two references, one to a tab 1 of Book 1,  
10 and a tab 2 of Book 1. Two more references on page 11 to tab  
11 2 of Book 2, tab 3 of Book 1.

12 So the minutes, which are the critical record of  
13 what the Board reviewed, what was presented, what they  
14 questioned, it's based on tab numbers in an overall book. And  
15 we don't think it would create a very good record to sort of  
16 pull out random pages, and many of which -- we believe many of  
17 these documents, maybe not all of them, we don't need to move  
18 in every single piece, but we believe many of them are  
19 information the directors relied on in approving these fees.

20 So, we think these are the way they're kept in the  
21 ordinary course of business. It puts us in a weird position  
22 to unbundle it somehow and then say well's it not how it's  
23 kept, we pulled out random pages. It would be an unclear  
24 record because we might pull out pages 12, 18, 28, instead of  
25 having consecutively numbered pages, so it wouldn't create a

1 very clear record.

2 So what plaintiffs have done -- so on our exhibit  
3 list, your Honor, this would be Exhibit 1. And we think it's  
4 a -- I'm just trying to respect your time because it will be a  
5 lengthy trial; when we put a witness on to lay a foundation to  
6 say we need to move a voluminous amount of Board materials in,  
7 we would put on a witness to say this is Book 1, this is the  
8 way it's kept, meet that requirement and move on.

9 If we unbundle, the plaintiffs would have this taken  
10 apart and made into -- there'd be some subjectivity to what's  
11 a separate document. But they would say break this into 150  
12 or 200 components, and then have a witness come in and say for  
13 each one, okay, this is this, this is this, and we'd do six  
14 days of foundational testimony by unbundling the book for what  
15 end. I mean the Trustees say they rely on all the information  
16 they get in approving the fees.

17 And just to go back to Defendant's Exhibit 2, your  
18 Honor --

19 THE COURT: So you're saying the custodian of  
20 records may show as one of your witnesses, and the custodian  
21 of records would say, well, these are all the books from the  
22 Board of Trustees meetings between certain periods.

23 MR. MURPHY: Yeah. And whatever -- and if you  
24 wanted more detail we can obviously break it down, but we  
25 would try and do it -- and we think these qualify quite

1 clearly as business records. You know, plaintiffs will point  
2 to one document in there that they think is, you know, hearsay  
3 within hearsay, but we think the bulk of them will come in as  
4 business records.

00:16 5 Just to turn to tab 3 in Defendant's Exhibit 2, your  
6 Honor, which is the skinny book, so this is the way -- and I  
7 was actually generous because there's a more confusing one  
8 that's on plaintiff's list, but this is a document as it  
9 appears on plaintiff's exhibit list. And so if you look at  
00:17 10 the heading at the top, it says EQ Advisors Trust Board  
11 Meeting July 8th and 9th, 2013, Book 2 Industry Report; so  
12 this was pulled out of Book 2, but we have no idea what tab it  
13 was behind. So if this is referenced in the Board materials  
14 as tab 2 of Book 2 we don't know what it is, there's no cross  
00:17 15 reference to the Board materials.

16 You'll see it starts on page 9, and goes to page  
17 226. Obviously there's only about 50 pages here, so they jump  
18 all over the place, it goes from page 9, then it goes to page  
19 18 to 27, 46 to 50, 62 to 80, whatever the page numbers are  
00:17 20 but there's massive gaps. And to what end? That's not how  
21 they're kept, and the references in the Board materials will  
22 be incomplete. It just doesn't seem like an efficient way to  
23 do it.

24 The reason why we're trying to deal with this now,  
00:18 25 your Honor, again going back to where I started was at first

1 blush this could seem like something we could wait on, you  
2 could hear testimony and decide; but the problem is the  
3 parties have made absolutely no progress at resolving what  
4 Board materials can come in.

00:18

5 And your Honor -- so, they're relying on the Board  
6 materials extensively. All their experts use them. We looked  
7 at their exhibit list, they have 400 exhibits; over 200 of  
8 them are the Board materials, more than half their exhibits  
9 are the Board materials. We want the complete record to come  
10 in, but we haven't resolved a single objection.

00:18

11 Plaintiffs have objected to every single page of the  
12 Board materials; they're not conceding one page should come in  
13 yet. Even though they admit some are business records they're  
14 relying on them, because they're saying well, you've got these  
15 big books, and if I have one -- one objection on one page, I'm  
16 -- that's my objection; and I'm not going to go through them  
17 and tell you what they are, it's -- we don't like the way  
18 you've done it.

00:18

19 If we were, your Honor, to have some guidance from  
20 you that these can be as presented as one book and that's how  
21 we lay the foundation through a witness at trial, you would  
22 accept them as such and it's appropriate to include them on  
23 the witness as such, they could then go through them. If they  
24 have some objections to some pages we could meet and confer;  
25 we may be willing to pull out some pages that we both agree

00:19

1 are irrelevant, it's not a problem.

2 If for purposes of ease of trial, people want to  
3 take out one tab and use it, we have no objection to that. So  
4 we're not saying they can't use the exhibits on their list,  
5 we're just trying to do this in an efficient way and put the  
6 records into evidence the way they're kept in the ordinary  
7 course. That doesn't seem like a tall ask.

8 But if we wait 'til trial, here's my fear, your  
9 Honor, here's why I think you need to do something; we go to  
10 put on Book 1 and we've got a stack of books and we're going  
11 to go through them all. They say no, you need to unbundle  
12 them into 200 components each, so it's really now 4,000  
13 different exhibits. And then they're going to object and say  
14 well, this relates to a fund not at issue, redact that out,  
15 you know, do redactions, pull out pages; then we would do that  
16 -- we'd have a new exhibit list with 4,000 pages which would  
17 take a tremendous amount of time. They would then have to go  
18 through and lodge a new set of objections, all of which we  
19 could do that if we got some guidance from your Honor.

20 THE COURT: Well, assuming that -- I don't know  
21 exactly have to state my -- but I'd ask the parties to look at  
22 Rule 1006, and it says there: The proponent may use a summary  
23 chart or a calculation to prove the content of voluminous  
24 writings, recordings or photographs that cannot be  
25 conveniently examined by the court.



1           So, if you're going to have 50 of these books, I  
2 would say that fits into the phrase "cannot be conveniently  
3 examined by the court." So the proponent must make the  
4 originals or duplicates available for inspection on a  
5 reasonable timeframe, but you may make a summary of that;  
6 right? Is there a way that I get a summary of what's in the  
7 books, so I get a list of what pages I should refer to when  
8 you're going through all this testimony?

9           MR. MURPHY: So yes, in some regard -- and we're  
10 very cognizant of burdening you with -- with cumbersome  
11 exhibits and voluminous materials, so we've -- we've  
12 undertaken, for example, to go through the *Gartenberg* factors,  
13 profitability is one of the factors. And there's 12 funds and  
14 five years, so there's 60 data points of profit margins  
15 there's; there's also a management and admin contract, so now  
16 you double it, there's 120 data points, all of which are drawn  
17 from the Board materials.

18           And we've prepared demonstrative exhibits that we  
19 think qualify as summary charts under 1006. We've cited the  
20 source material which is in the Board materials, so we're  
21 going to do all that, and that will certainly make your life  
22 easier, but we do -- there are a couple reasons where we think  
23 we need the Board materials actually to be moved into  
24 evidence, and there's two main reasons, your Honor.

25           First, one of the most important things you have to

1 decide up front is whether the Board was fully informed, and  
2 if we just give you a list of, you know, they got this broad  
3 type of information, you don't -- you don't necessarily have  
4 in the record what the Board saw. And they could come in  
5 after trial in post trial briefings and say there's no  
6 evidence, your Honor, the Board was told A, B and C; and it's  
7 absolutely buried in the Board materials, but it's not in some  
8 summary list.

9 And secondly, your Honor, you may recall the  
10 complaint in this matter, the allegation is that FMG delegated  
11 virtually all of the work to a sub-advisor, and one of the  
12 things that's required by both the management and admin  
13 contract, different pieces, but both contracts cover some  
14 portions of the Board materials, so it's -- a lot of the stuff  
15 that's in there you need to see and see how hard it is to  
16 prepare and the work that FMG does to put it together as  
17 evidence of what we do.

18 And again, that's -- that's regardless of the truth  
19 of the matter asserted, your Honor. So even if they had some  
20 business records problem, we could put in a lot of this  
21 material to show what FMG does. So there's a lot of reasons  
22 why isolated pieces or just summarize don't get it done for  
23 us, given the allegations that we don't do anything. So they  
24 don't want us to put in what we do, your Honor, this is a huge  
25 substantive piece to say well, you don't -- it doesn't take

1 any time to prepare this, anybody can do this. That's just  
2 not the case and we need to show you that in many respects.

3 Now, that doesn't mean, your Honor --

4 THE COURT: I got your point.

00:23 5 MR. MURPHY: Okay. So what are we asking for; we  
6 just think because these are the way the documents are kept,  
7 it's a more efficient use of the Court's time, it would be a  
8 clearer record, that we be permitted to treat these as a  
9 single exhibit. And plaintiffs, if they object -- there's  
00:24 10 many of these documents they want in too, but if they object  
11 to portions of it, identify them and we'll meet and confer and  
12 see if we can resolve those, because there may be some where  
13 we can reduce the volume by taking it out.

14 I will say -- you know, they'll say there's hundreds  
00:24 15 of thousands of pages; there are significant portions of, for  
16 example, Book 2 we think we can eliminate 50,000 pages if we  
17 can meet and confer on the issue, and just stipulate that  
18 although this is not the way they're kept in the ordinary  
19 course of business, we remove these 50,000 pages we could  
00:24 20 greatly shorten them. So I think there are ways we can make a  
21 lot of progress, it's more of just can we start doing it.

22 THE COURT: Why can't we just put them on a disk?  
23 Why do we have to have all the books?

24 MR. MURPHY: And that would be our intent, your  
00:24 25 Honor. We have no intention of showing up and going through

1 page by page with you, it would really just be getting them in  
2 as business records; they would want us to unbundle it, and --  
3 they may say this is a thousand documents, I suspect they have  
4 their -- they're going to stand up and probably show you as  
5 they showed to Judge Arpert, they're going to take this exact  
6 same document and say, it's got yellow tabs all over it, and  
7 all they've done is pull the chapters out of a book and say  
8 oh, it's a thousand different documents, and they want us to  
9 lay a foundation for each of those thousand which is totally  
10 not practical or efficient use of your time when many of them  
11 they don't even object to.

12 THE COURT: All right.

13 MR. MURPHY: Thank you, your Honor.

14 MR. LAKIND: Thank you, your Honor. And I, too,  
15 apologize for the manner in which our papers were submitted.

16 THE COURT: Yes, thanks.

17 MR. LAKIND: Unfortunately the problem is  
18 considerably more complicated than counsel has indicated,  
19 which is why plaintiffs are of the view they should be  
20 revolved by way of motion.

21 What I would like to do is first address the context  
22 in which this problem arises, and secondly, propose what I  
23 think is a fair and reasonable solution for all parties.

24 Let me start first with the context in which this  
25 problem arises. Defendants in this matter have served an

1 exhibit list with 1,871 separate documents, that total nearly  
2 one million pages. We frankly were overwhelmed by that list.  
3 We could not sensibly review an exhibit list of that  
4 magnitude. It contains many, if not the majority, of  
5 documents are utterly irrelevant to this case. By serving an  
6 exhibit list of that magnitude it defeats the goal of the  
7 whole pretrial process to have -- to make our cases  
8 transparent. In contrast, our exhibit list is some 400 odd  
9 exhibits, most of which are drawn from the Board material.

10 When defendants made their summary judgment motion,  
11 they had the ability to isolate documents they thought were  
12 relevant to the disposition of this matter included in their  
13 motion, and respectfully that's what they should have done  
14 here.

15 Now, this is not a problem that arose recently; it  
16 arose in November, 2014, more than one year ago when I had a  
17 conversation with counsel, and indicated that I did not think  
18 Board material was a business record. It's an advocacy  
19 document, it's a document which the Board uses -- excuse me;  
20 which FMG uses to negotiate a higher fee with my clients'  
21 Board of Directors. If we have the opportunity to brief the  
22 issue, we will demonstrate that this -- these 15,000 pages are  
23 not business records, they're documents prepared by counsel,  
24 they're documents with opinions; they could not satisfy the  
25 business record exception.

1 But the evidential ruling on this document is  
2 inextricably intertwined with substantive issues. And what  
3 I'd like to do now, your Honor, is turn to what I perceive to  
4 be a simple straightforward way to deal with the issues. It  
50:28 5 appears from reviewing defendant's papers that they are of the  
6 view that the Board materials are relevant on three issues:  
7 Number one, the extent of the work done by FMG; number two,  
8 was the Board fully informed; and number three, were the  
9 substantive truth of a variety of documents, the performance  
50:28 10 of the funds and the expenses of the funds and so on.

11 Let me first turn to the first issue, which is the  
12 extent of the work done by FMG. The overwhelming majority of  
13 the 1,871 exhibits and the 100,000 pages of Board material are  
14 utterly irrelevant to this case. This case is brought on  
50:29 15 behalf of 12 mutual funds. FMG claims to be the advisor to 90  
16 mutual funds. So there is information in that Board material  
17 with regard to 78 mutual funds that have nothing to do with  
18 this case. How we or the Court or any witness is able to go  
19 through and understand those is well beyond me.

50:29 20 THE COURT: Well, couldn't some of the funds have  
21 overlapping issues?

22 MR. LAKIND: That's what I'd like to turn to. There  
23 are three categories of information within the Board material.  
24 The first category is material that clearly relates to our 12  
50:29 25 funds. The second category is Board material in which there

1 is overlap, that it affects our 12 funds and the 78 other  
2 funds. And the third category is work done on behalf of other  
3 funds.

4 For instance, in the very first exhibit on their  
5 exhibit list, there are 100 -- there are well over 100  
6 documents in that single exhibit which pertain to other funds.  
7 There are contract with other funds, they're boards of ethics  
8 of other advisers, they're information about other funds; that  
9 is not the least bit relevant to what the Board does with  
10 regard to the 12 funds we represent. And it's simply  
11 impossible for counsel or the Court to examine them.

12 I would respectfully submit the way to deal with  
13 this issue insofar as they want to demonstrate the magnitude  
14 of their work, is to pull out the information that is  
15 completely irrelevant to this case, to the 78 funds that are  
16 not even plaintiffs before your Honor.

17 With regard to the remainder, some of those were  
18 prepared by FMG, and we can look at them and agree to that.  
19 But a various large number were prepared by others. And one  
20 of the issues in this case is who did what work; well, with  
21 regard to the others we should have an agreement that the work  
22 that indicates it was prepared by others was in fact prepared  
23 by others. The remaining documents we can talk to and try and  
24 resolve what happens to them. We can't do it with 100,000  
25 pages of paper. It's impossible to know what is in there.

1           The second issue they tell you this information is  
2 important to is --

3           THE COURT: I don't know, but during the course of  
4 this trial they'll be presenting certain pages for me to  
00:31 5 review; right? They're not going to ask me to review the  
6 documents of 78 mutual funds that have no bearing on the case  
7 so to speak; right? So if they're only asserting certain  
8 pages, why don't you just go to those pages? Why should they  
9 do this initial -- go through all the Board documents and then  
00:32 10 delete everything that's not -- what you say may not be  
11 relevant.

12           And if you say it's not relevant, why isn't it your  
13 job to show exactly what pages they are? I mean, they keep  
14 these records -- I don't know why who the secretary of the  
00:32 15 Board is, but generally the custodian of records could be just  
16 some person, you know, that doesn't have all the -- I want to  
17 say this correctly; it could be just a person that's familiar  
18 with what was presented at the Board, and what they have kept  
19 as a result of that Board meeting, and they would be the ones  
00:33 20 to say I've had it, it's been in my office, we haven't altered  
21 it, and it's usually kept every week or every month, and  
22 that's how you get the board pages in.

23           But they might not have the knowledge to know what  
24 mutual funds they apply to, whether it's the 78 or less than  
00:33 25 the -- or whatever it is. So, I'm not sure why it's their



1 burden to do that. Maybe you'd have to come forward with  
2 what's irrelevant.

3 MR. LAKIND: Okay. Your Honor, let me --

4 THE COURT: I mean you're asking them to do your job  
5 first.

6 MR. LAKIND: I think not, your Honor. Number one,  
7 the Board materials are hearsay; I mean everyone agreed to  
8 that when we were in court before Judge Arpert. In the course  
9 of the discussions, defendants said they would undertake the  
10 burden to make a motion for -- to make a motion to admit these  
11 documents as an exception to the hearsay rule.

12 These documents are not business records, and if we  
13 are given the opportunity to brief this issue, we will  
14 demonstrate that they are not business records. They are full  
15 of conclusions, they are full of judgments -- some are, some  
16 are financial records that are legitimate business records,  
17 and we didn't object to over 400 of those documents.

18 But the overwhelming majority are opinions, they are  
19 not business records. And it's their burden to demonstrate  
20 that these documents fall within the exception to the hearsay  
21 rule, and if we are permitted to brief it they will not be  
22 able to do take.

23 Secondly, your Honor indicates that -- I'm sorry.

24 THE COURT: No, go ahead.

25 MR. LAKIND: Your Honor indicates that, well,

1 they're going to only ask you to look at a certain subset of  
2 these documents and hopefully that is the case. But the whole  
3 purpose of an exhibit list in a pretrial order, is to provide  
4 some transparency to all parties as to what each party thinks  
5 is relevant to the disposition of the case. When we receive  
6 an exhibit list of 400 different pages -- excuse me; 400  
7 documents that constitute Board materials, and 1,871 documents  
8 that they say are exhibits, it's impossible for us to discern  
9 what is relevant and to properly prepare our witnesses.

10 Third, if defendants are going to ask your Honor to  
11 only look at some documents in trial, why should they not do  
12 it now so that we can simply eliminate the objections in  
13 advance. Plaintiffs did that, and defendants did that in  
14 connection with their motion for summary judgment. To require  
15 the parties to sit here and go through irrelevant page after  
16 irrelevant page, simply is not in anyone's interest.

17 The issue here is what did FMG do; we say they  
18 didn't do very much and others did. They need to lay that  
19 foundation as to what they did. Simply putting the Board  
20 materials in does not do that.

21 There's a second issue --

22 THE COURT: Well, it may not be all of the evidence,  
23 but it could be a portion of their case. So, I think that  
24 they should be -- in zealously defending their case they  
25 should be able to put in all the information they believe is

1 relevant; one of it would be what the Board members were  
2 thinking or how they formed their opinions.

3 MR. LAKIND: Absolutely, and I'll get to that in a  
4 moment --

00:36

5 THE COURT: So that's where you get to these Board  
6 members; here's what I was looking at, this is what I thought  
7 was a smart thing to do.

00:37

8 MR. LAKIND: Absolutely and I'd like to get to that  
9 in one moment, but your Honor, let me just clarify one thing;  
10 there are many things in this Board material which they are  
11 going to claim credit for having done. And that's an area of  
12 significant dispute. Our evidence --

13 THE COURT: That's why we have trials.

00:37

14 MR. LAKIND: Our evidence will show that others did  
15 that work. They need to lay a foundation to demonstrate what  
16 they did, because otherwise a document will simply come in as  
17 being handed to your Honor as an example of work, which they  
18 cannot lay a foundation that they did it. So that's why with  
19 regard to what they did we're objecting on foundational  
20 grounds.

00:37

21 Now, your Honor said a moment ago --

00:37

22 THE COURT: The question is evidence; right? So  
23 they're looking at this as showing this is evidence of  
24 something we've done; if you dispute that they haven't done it  
25 then you can bring in whatever evidence you want. Right?

1 MR. LAKIND: Yes, sir.

2 THE COURT: So, then it's up the Court because I'm  
3 also the trier of fact as to weigh that evidence, who's right.  
4 So I don't get your point that they're going to try to say  
5 they did something they didn't do; well, if that happens  
6 you'll have your opportunity to present that evidence.

7 MR. LAKIND: Well, perhaps, your Honor, let me give  
8 you an example of one piece of evidence that is typical of  
9 this. There's been a good deal of argument over the  
10 admissibility of a side-by-side chart and your Honor might  
11 recall that was argued before your Honor some months ago.  
12 Defendants are of the view that that was something that was  
13 prepared by FMG; plaintiffs are of the view that is something  
14 that was prepared by counsel.

15 There are a variety of reports that we think were  
16 prepared by sub-advisors; defendants of the view that it was  
17 prepared by them. They need to lay a foundation to say we're  
18 giving this to you, the finder of fact, as an example of our  
19 work, and the foundation that we -- that we did this work is  
20 this. We are entitled to have them lay a foundation if a  
21 document is to come in as an example of work. It shouldn't  
22 simply be handed up to your Honor as the work.

23 Your Honor also mentioned that well, doesn't the  
24 Board -- don't they have the ability to have the Board say we  
25 looked at this document, we reviewed this document; and the

1 answer to that is yes, because one of the issues in this case  
2 is how careful and how conscientious was the Board.

3 However, this information was posted to an Internet  
4 site called Diligent, three weeks before the meeting. Board  
5 members have testified they didn't review this information.

6 So when the assessment becomes how well informed was the  
7 Board, the fact that it was posted is not an indicia of what  
8 the Board did and what the Board knew.

9 We will have testimony from a board member that said  
10 that they didn't look at all of this information. So the  
11 notion that merely posting it is -- is evidential of how well  
12 informed the Board is, is a legal issue. Going back many  
13 years in the old days when the question was if you mailed a  
14 letter was it received, and there were certain inferences or  
15 presumptions that developed. Likewise there's a legal issue  
16 here. Merely posting this information --

17 THE COURT: I don't get how those two things are  
18 related. I mean mailing a letter always goes to -- it's  
19 whether people had notice of a hearing, for instance, if you  
20 go to a planning board or a variance or something of that  
21 nature, you know, you have to send a letter to your neighbors  
22 telling them that you're applying for something. And the  
23 issue with regard to that notice is whether the parties had  
24 the right to present any objections they might have. So it  
25 goes into a notice and due process issue.

1 Here we're talking about the posting of things on  
2 the Internet for Board members to read. It's not whether they  
3 got it or not, we know they got it. So, I don't see how you  
4 analyze whether a letter was sent and received to be the same  
5 as what we're doing in this case.

6 MR. LAKIND: I think the analogy was a poor one, but  
7 that being said, that being said, the mere fact that this  
8 material was posted on the Internet in the face of testimony  
9 from Board members that they did not read it, does not  
10 demonstrate that the Board was well informed. They need to  
11 bring in --

12 THE COURT: I don't even see the merit in your  
13 argument, because that seems to me as that the defense  
14 presents this as evidence that the Board considered it, you  
15 present evidence that the Board didn't consider it, and then I  
16 have to weigh the evidence. That's what we do at trials. So,  
17 I don't see why because you have this evidence that's contrary  
18 to the defendants, that I should rule that the evidence is not  
19 admissible. That makes no sense to me.

20 MR. LAKIND: No, I'm not making that argument. The  
21 argument I'm making, your Honor --

22 THE COURT: Yes, you are.

23 MR. LAKIND: -- is that in addition to posting the  
24 information on the Internet, to make it relevant they need to  
25 bring a board member or Board members in to say we reviewed

1 this information, and it formed part of our decision-making  
2 process. Merely posting it on the Internet does not make it  
3 admissible. If they take the second step, then we have a  
4 factual dispute, because we'll bring in evidence that they  
5 didn't look at it.

6 THE COURT: So you think that the custodian of  
7 records -- we usually do it through a custodian of records,  
8 but you're just saying that to have the entire books  
9 admissible, then we'd need the custodian of records who  
10 maintained the books, plus some board member who said we  
11 relied on it; is that what we're here about?

12 MR. LAKIND: That's one component of the argument,  
13 that merely posting it on the Internet does not make it  
14 admissible unless they take the second step, which is to bring  
15 a board member in -- which they can't do because the Board  
16 members will testify they didn't review it; bring a board  
17 member in to connect the posting to the deliberative process.

18 THE COURT: All right.

19 MR. LAKIND: Your Honor, the third issue, of course,  
20 is the substantive relevance, and here I think we did our best  
21 to identify all of the Board material that represents --  
22 excuse me; that relates to these significant issues, the  
23 profitability, comparative fees, expenses and so on. We  
24 didn't object to some 400 of the 1,800 exhibits that they  
25 mentioned; we think we have the universe of what was relied

1 on.

2 If they are -- if they will make a motion and  
3 indicate we left information out or they left information out,  
4 and it qualifies as a business record, we're going to consent  
5 to it. But to resolve an issue of this magnitude without a  
6 motion that really explains in detail what went on, is simply  
7 not fair to plaintiffs, your Honor.

8 THE COURT: Well, why isn't it fair?

9 MR. LAKIND: Well, your Honor, because number one,  
10 we haven't even briefed the business record issue at any  
11 length. The premise of the argument you heard a few minutes  
12 ago was that these are -- these are definitively business  
13 records. Yet there is a decision in the District of New  
14 Jersey that -- in the *Ebenhoech/Koppers* case which essentially  
15 says documents of this nature would not qualify as business  
16 records. So we need the opportunity to address those issues,  
17 your Honor.

18 THE COURT: Well, I'm not moving off the trial, I  
19 was actually going to ask you if you wanted to move up the  
20 trial. So, if they present the books at trial, right, then  
21 you make their objection when they come up; right? That's  
22 usually how it happens. So, you got this letter -- I think  
23 the first letter came from Blank Rome --

24 MR. LAKIND: Yes, your Honor.

25 THE COURT: So, they presented the issue, and I



10:46 1 believe you've responded; I don't know if it was on the same  
2 issue, it was respect to the admission of 409 exhibits -- oh  
3 yes, consisting of 200 pages of the Board materials. So you  
4 filed some response, but you didn't file a full response; is  
5 that what you're saying?

6 MR. LAKIND: No, what I said in my letter, your  
7 Honor, is that we were responding to whether or not this  
8 should be done informally or on a motion, and we didn't  
9 understand defendants to be moving for the actual admission of  
10 the documents.

11 THE COURT: Well, I didn't either, that's why I  
12 brought up that point in the beginning.

13 MR. LAKIND: Yes.

14 THE COURT: But they're looking for some guidance  
15 here. So, do you have any other arguments? You just want  
16 more opportunity to be heard?

17 MR. LAKIND: Your Honor, I don't think -- listening  
18 to your Honor's inclinations, I'm not sure it would be  
19 fruitful to submit anymore papers; I think I have a sense of  
20 what your Honor's thinking.

21 THE COURT: I'm not sure exactly what I'm thinking.  
22 I have some ideas of what I would do --

23 MR. LAKIND: Then I'd like a chance --

24 THE COURT: -- to narrow the dispute to tell you the  
25 truth.

1 MR. LAKIND: Then your Honor, can I submit a five  
2 page, double-spaced, 14 font letter that just tells what our  
3 position is, responding to the substantive letter that Blank  
4 Rome submitted?

00:47 5 THE COURT: When can you do that by? Friday?

6 MR. LAKIND: I'm sorry, your Honor?

7 THE COURT: Friday?

8 MR. LAKIND: Yes, your Honor, Friday.

9 THE COURT: And do you want to reply?

00:47 10 MR. MURPHY: Yes, your Honor, I don't know what he's  
11 arguing --

12 THE COURT: Monday.

13 MR. MURPHY: Okay.

14 THE COURT: So I'm breaking early next week, but  
00:47 15 I'll try to give you a decision before I leave next week.

16 MR. LAKIND: Your Honor, may I raise a couple of  
17 issues counsel had been speaking about?

18 THE COURT: All right.

19 MR. LAKIND: Number one is we know there are a  
00:48 20 number in limines on in early January, but it's all of our  
21 expectations that objections to expert testimony will be  
22 handled in the course of trial. We just -- all of us wanted  
23 to make sure that was the case and they wouldn't be argued.

24 THE COURT: Usually that's what I do.

00:48 25 MR. LAKIND: Okay.

1 THE COURT: But I will -- actually if you want to  
2 make arguments on any of the experts, I'll listen to that at  
3 the time of the in limine motions. A lot of times I reserve,  
4 but --

00:48

5 MR. LAKIND: I think we've argued the issue once,  
6 and I think it would be certainly our preference when the  
7 witness is called; I don't know how Mr. Murphy feels.

8 MR. MURPHY: For experts that's correct, there may  
9 be other motions in limine that we want to argue --

00:48

10 THE COURT: Right. We don't have a jury, so we can  
11 spent time arguing whether an expert should be heard or barred  
12 or whatever during the course of the trial. I think that  
13 makes sense to me to tell you the truth.

00:49

14 MR. MURPHY: And your Honor, I'm certainly not  
15 interested in arguing something that if there's not a point to  
16 it -- if that's the practice on any of these motions in  
17 limine, if you read them and you're clearly going to need to  
18 hear the evidence at trial there's -- we can take the argument  
19 up at trial. So --

00:49

20 THE COURT: I know. I don't mind doing in limine  
21 motions, only because I learn a lot about the case from when  
22 we start the trial, so it's of help to me.

23 MR. MURPHY: Good.

00:49

24 MR. LAKIND: Your Honor, the second question is, I  
25 think there's a indication of Dolores of your office that she

1 might be able to show our technical people today some  
2 material? I don't know if it's a bad day --

3 THE COURT: Yes, whenever they want. We need to get  
4 Dan and the technical guys up here, but they're here  
5 full-time. So if you just tell us when they're coming in,  
6 we'll probably be able to set up an appointment with them.

7 MR. LAKIND: Okay. Third, your Honor, is on January  
8 25th I have to be in California to argue a case; is there any  
9 chance -- and I can raise it as we get closer -- that we might  
10 not proceed on that date?

11 THE COURT: Does anyone object to that?

12 MR. MURPHY: Just missing one day of trial -- I  
13 didn't catch the date?

14 MR. LAKIND: January 25th.

15 MR. MURPHY: Yes, no objection.

16 THE COURT: All right. No problem.

17 Okay. So, there might be times during this trial  
18 where I might have to break for a while, I don't know; I have  
19 some criminal cases that are pending. So, we were looking at  
20 five to seven days, but it seems it's going to be a lot longer  
21 than that?

22 MR. LAKIND: I think, your Honor, my guess is it  
23 will be about 15 trial days; I don't know how Mr. Murphy  
24 feels.

25 MR. MURPHY: Yes, your Honor, we're in a little bit

1 -- and some of that relates to this issue; we're in a little  
2 bit of an uncomfortable position in the sense that our  
3 allegation is we don't do anything, right. So kind of backs  
4 me into a corner to bring in evidence, and I'm trying to do it  
5 in summary ways, but I need to tell you what FMG does as an  
6 advisor/administrator for a mutual fund which we would say is  
7 a massive amount of work, and it's hard for me to just sort of  
8 put on a witness and say yeah, we're working a lot.

9 I've been backed into a corner where I need to bring  
10 in witnesses and say okay, tell me what services we provide in  
11 various buckets, compliance, admin or portfolio management.  
12 So it is going to be -- I think we projected eight to 10  
13 trials days just for our case.

14 THE COURT: So, it may come a time where -- well,  
15 let me tell you when I wanted to start. I have you down for  
16 the 11th or 12th, but the case the week before was adjourned  
17 for some reason, so I might be able to start on the 6th.

18 MR. LAKIND: The only thing, your Honor, from our  
19 perspective, we have our experts lined up, I'm not -- and one  
20 of my partners is trying it -- or two of my partners are  
21 trying it with me, so I'm just not sure what the experts' and  
22 everyone's schedule is, that's the only thing.

23 THE COURT: Well, we can put all your fact witnesses  
24 on, we'll accommodate the expert witnesses to the extent we  
25 can, but we can do those in limine motions earlier. So, I'm

1 available beginning the 6th. So, we had you coming in on the  
2 11th; right?

3 MR. LAKIND: I think, your Honor, you have us in on  
4 the 4th for the in limines.

00:52 5 MR. MURPHY: 4th for the in limines, January 11th  
6 for the start of the trial, your Honor.

7 THE COURT: Well, we'll do the in limines on the  
8 6th.

9 MR. MURPHY: We'll do whatever -- we're happy to  
00:52 10 start on the 6th, we're happy to do the in limines on the 6th,  
11 whatever your Honor wishes.

12 THE COURT: I have the 6th, 7th and 8th, so all the  
13 motions we can do and any practical problems on the 6th and  
14 the 7th, and we can start the testimony on the 8th. And then  
00:53 15 you'll be right where you were, Mr. Lakind, and then you can  
16 present your experts starting the 12th.

17 So I have you the week of the 6th, 7th and 8th, 11th  
18 through the 15th, and then I believe I have you the next week  
19 the 18th through the 22nd. And you wanted off the 25th?

00:53 20 MR. LAKIND: If possible, your Honor. I think  
21 that's a Monday.

22 THE COURT: Yes, the 25th is -- I might have to  
23 adjourn that week, I have a number of trials on.

24 MR. LAKIND: Your Honor, it might be the 25th and  
00:54 25 the 26th just because I'll be flying back from California.

1 THE COURT: Okay. So, if we're not going to do the  
2 25th and 26th, the 27th, that looks to me maybe the afternoon,  
3 1 o'clock to 4:00. Then the 28th and 29th we should be  
4 around. And then the 2nd I'm here, and the 4th and 5th of  
5 February I'm here. Is that enough time? Until the 5th of  
6 February?

7 MR. LAKIND: I think we'll go probably about seven  
8 to eight days, your Honor, for us.

9 THE COURT: I have 6th, 7th, 8th, that's three; then  
10 the next week is five; then the next week -- well, the 18th is  
11 a holiday, it's Martin Luther King Day; the 19th's a motion  
12 today so you won't come in. And then I have the 20th, 21st,  
13 and 22nd, three days; there's a few things on so I think we  
14 will go the whole day, but we might be interrupted for an  
15 hour. And then the 25th and 26th you're out.

16 So then 27th is from 1 o'clock; and then the 28th  
17 and 29th. The 1st is a motion day, so I won't have court that  
18 day. The 2nd, the 4th and 5th, three more days; looks like a  
19 lot of time.

20 MR. LAKIND: Yes, it is. Your Honor, just if I  
21 might mention, the 25th and 26th we're going to have three  
22 attorneys trying this case, so if I'm away and it's not a  
23 witness I'm going to do, we may if it's okay with your Honor  
24 suggest that we proceed that day.

25 THE COURT: You have to let us know --

1 MR. LAKIND: We'll know as soon as we see how fast  
2 we're going.

3 THE COURT: Well, hopefully it will be fast.

4 All right. So, we didn't get back to the issue yet.

00:57 5 Does that take care of the timeframe? Does anyone have any  
6 objections to that?

7 MR. LAKIND: We do not, your Honor.

8 MR. MURPHY: No, your Honor.

00:57 9 THE COURT: So, you've made all your arguments with  
10 regard to the board minutes?

11 MR. LAKIND: I have, your Honor.

12 THE COURT: Do you wish to bring?

13 MR. MURPHY: I'm very tempted, your Honor; just  
14 maybe two minutes?

00:57 15 THE COURT: You may.

16 MR. MURPHY: Thank you, your Honor. Just in terms  
17 of, you know, transparency is what he said, we did offer last  
18 week -- we're not trying to hide the ball. We think the Board  
19 materials need to come in and a significant volume of them,

00:57 20 but we did offer to try and identify what documents we're  
21 actually going to show our witnesses and the judge. We're not  
22 going to go through a hundred thousand pages and show you  
23 stuff. We're going to identify some stuff, we're going to  
24 have summary charts, we're going to give them those summary  
00:57 25 charts, and we're going to identify specific pages of the



1 Board materials.

2 Again, we won't have a hundred percent precision  
3 because some of our case is rebuttal, but we think we can cull  
4 down the list and get, you know, a large chunk of what we show  
5 our witnesses and tell them that in advance, so they're going  
6 to see what we show witnesses.

7 THE COURT: When will you tell them in advance by?

8 MR. MURPHY: I imagine the next couple weeks. We  
9 just have to go to each witness and look at their direct exam  
10 and pull out those documents, so we can do well in advance of  
11 trial.

12 THE COURT: Okay. So, by the 23rd of December.

13 MR. MURPHY: Okay. The second point I would just  
14 make, your Honor, is that most of the stuff he's talking about  
15 is cross-examination, so he can stand up --

16 THE COURT: I understand.

17 MR. MURPHY: Okay. In terms of the other funds at  
18 issue, your Honor, just a couple points on that because it  
19 actually is a significant issue. There are 12 funds at issue  
20 and they're part of a trust, so it's one trust; the Board sits  
21 on all of them, and they're claiming that there's stuff about  
22 other funds that's irrelevant. And as your Honor said, are  
23 there overlapping issues; absolutely, right.

24 So they're pointing to advantages across all funds.

25 They're pointing to overall profitability, they're arguing

1 that economies of scale in one fund that's not at issue should  
2 cause breakpoints in our funds and they should be aggregated  
3 across assets. They're claiming our employees are spending  
4 time on other funds, so they're very much at issue.

00:59

5 Our Board has negotiated numerous fee reductions on  
6 funds not at issue as well, and that certainly goes to  
7 diligence. Even if it's one fund not at issue, if where they  
8 saw a problem, they negotiated a fee reduction and they  
9 explain why, it certainly goes do their diligence. So it's

00:59

10 relevant, but to redact it -- and you can just look at Book 1,  
11 your Honor, which Defendant's Exhibit 1, you can go through --  
12 a lot of times it's a page of all the funds, and you're not  
13 going to redact out individual funds, it would take us an  
14 enormous amount of time, to what end. If it's irrelevant it's  
15 going to be on a disk, we're not going to show it to your  
16 Honor, there's no harm, it would just create a significant  
17 amount of work for no reason.

00:59

18 And the last thing, your Honor, which I agree  
19 doesn't go to the substance, but, you know, they claim that a  
20 board member said they didn't read every page; the correct  
21 testimony was they don't read every page because they rely on  
22 counsel in some instances to summarize what's relevant, and  
23 that was one trustee. Two other trustees, including the  
24 30(b)(6) for the Board, testified very clearly I review all  
25 the materials or in some instances my counsel reviews them and

01:00

01:00

1 summarizes them for me.

2 So there is going to be testimony, we're designating  
3 that in, from two trustees saying they review all the  
4 materials. But it doesn't matter, even if they didn't it's  
5 still a business record because they're records of FMG the  
6 advisor. Thank you, your Honor.

7 MR. LAKIND: Your Honor, I know it's late, but could  
8 I just raise two very quick issues?

9 THE COURT: Well, quick is a minute or so.

10 MR. LAKIND: They will both be. If we get that list  
11 -- I had not realized they were prepared to give us that list,  
12 that may obviate a lot of these issues, so that would help  
13 enormously, we were not aware that that was going to happen.

14 Secondly, our first witness is Mr. Joenk, who's the  
15 defendant's CEO, he sets the stage and I think it's critical  
16 that he be our first witness; I want to make sure he can be  
17 available on the first day of trial.

18 MR. MURPHY: Sorry. The 4th through the 6th were  
19 the motions and the first day of trial would be the 8th? I  
20 would -- I'm sure he'll make himself available. I haven't  
21 spoken with him obviously, he's not here, but --

22 THE COURT: Well, Mr. Lakind can't have his experts  
23 here, so he needs you to bring your witnesses.

24 MR. MURPHY: I'll just make sure my witnesses can  
25 make for it up, so we'll certainly endeavor to do that.

1 THE COURT: I'm sorry, Mr. Lakind, but I think you  
2 should, if it helps the trial move smoothly I'd appreciate if  
3 you do that.

4 MR. LAKIND: I'm sorry, your Honor?

01:01 5 THE COURT: I was asking if you could have Mr.  
6 Joenk --

7 MR. MURPHY: No, absolutely, it's a matter of --

8 THE COURT: You know, if it makes the trial go  
9 smoother and he can be here, I'd request that you do it.

01:01 10 MR. MURPHY: I just work for him, so he's the  
11 president of my defendant so I don't commit his schedule, but  
12 I think he's available and we certainly would make him  
13 available, yeah.

01:02 14 THE COURT: I'm thinking that all those motions will  
15 probably take us all day on the 6th, so the trial wouldn't  
16 start until the 7th, so if that's the first day.

17 MR. LAKIND: Thank you, your Honor.

01:02 18 THE COURT: And it might take us a little longer  
19 than that on the motions, but we should get the trial started  
20 on the 7th.

21 MR. MURPHY: Thank you.

22 MR. LAKIND: Thank you, your Honor.

23 MR. MURPHY: Thank you for your patience.

01:02 24 THE COURT: At any rate, I don't know if it's a  
25 ruling or it's just guidance, but when I was listening to the

01:02 1 issue and even before I came out here, I had looked at that  
2 summary rule, and I had set it forth before, but it's 1006 is  
3 the rule. And generally when you have use summary charts and  
4 things of that nature, you always have the originals available  
5 for the other party to look at at a reasonable time, which  
6 they have. And if there's a list of the materials that are  
7 going to be referred to from the Board members, it should be  
8 given to the plaintiffs by December 23rd so they can start to  
9 review it, and I think that's the best way of doing this.

01:03 10 Having a lot of redactions and missing pages during  
11 the trial can cause disruption, and we'll be looking for other  
12 pages, I can't see doing that. So if we have them all here in  
13 some kind of disk format or some kind of format that we can  
14 see on the computers, then I think that's the way we should  
01:03 15 proceed. I can't see doing it any other way.

16 It seems to me that -- I know, Mr. Lakind, you're  
17 saying they're not business records and they could be hearsay,  
18 but in this case -- and I haven't read the case that you were  
19 referring to that said they were not business records kept in  
01:04 20 the ordinary course of business, to me when you're looking at  
21 what the Board of Directors does, it's what they do; they look  
22 at these volumes of materials time in and time out at every  
23 meeting, and you're questioning their diligence, their  
24 negligence, their carelessness, and these are all things that  
01:04 25 go to show whether they were amply advised before they made

1 the decision.

2 To me they look like they were the records that were  
3 relied on by the Board of Directors in the course of their  
4 business, so I would think I would allow them in on that  
5 basis; subject to you having any more briefing time if you  
6 want. But I think the smart way to do this is let's -- we  
7 have all the Board members, we'll admit them into evidence;  
8 the defendants under the obligation to give you the summary of  
9 what they're going to be relying on by next Wednesday the  
10 23rd, and then we'll rely on those summaries for the evidence  
11 that I'm going to be weighing. I believe that's what we're  
12 going to be doing; right? And I think you should make your  
13 objections as to those specific items that are listed in the  
14 summary.

15 MR. LAKIND: Your Honor, I think -- given your  
16 Honor's explanation I think we should not further brief the  
17 issue. We'll deal with it at trial or even in post trial  
18 briefing. It is a bench trial, so to the extent something  
19 comes in we want to object to we can deal with it later.

20 THE COURT: Exactly. Although we use the rules of  
21 evidence, it's not like you have six jurors there.

22 MR. LAKIND: Right.

23 THE COURT: You know, that could be misled or  
24 whatnot, and I guess I could be misled, but usually I see  
25 through it. And you know now that I'm not going to read 50

1 volumes of board member notes and books, so I'm only going to  
2 read what's in the summary.

3 MR. LAKIND: I think your Honor's procedure obviates  
4 a lot of the concerns we had as to what we should prepare for,  
5 too, so I think that --

6 THE COURT: Now, if you're going to be relying on  
7 parts of those board minute meetings, are you going to give a  
8 summary to them?

9 MR. LAKIND: They have a list of what -- exactly  
10 what we're relying on and it's self-evident what it's for;  
11 it's performance, expenses, I don't think there's any dispute  
12 about that. They've not objected.

13 MR. MURPHY: Ironically, your Honor, I think we're  
14 relying -- we're going to be all showing you the same  
15 documents, it's just we need a complete record as well.

16 THE COURT: All right. Any other matters?

17 MR. MURPHY: Not for the defendants, your Honor.

18 MR. LAKIND: Not for plaintiffs, your Honor.

19 THE COURT: All right. Thank you for coming in  
20 today.

21 (Counsel say thank you.)

22 (Matter concluded.)

23

24

25

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